(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 588

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Petitioner,

vs.

THE WINTERS NATIONAL BANK AND TRUST COMPANY OF DAYTON, OHIO, as Administrator de bonis non with will annexed of the Estate of Robert Chambers, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

[illegible]
Third Nat'l Bldg., Dayton, Ohio,
A. K. [illegible]
Gas & Electric Bldg., Dayton, Ohio
[illegible]

[illegible]

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

To the Honorable the Chief Justices and Associate Justices of the Supreme Court of the United States:

Comes now, The Massachusetts Bonding & Insurance Company, your petitioner herein, and respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals, Sixth Circuit, in the above captioned case.

OPINION BELOW

The opinion, of the Court below, is reported in Massachusetts Bonding & Insurance Co. vs. The Winters National Bank & Trust Company of Dayton, Ohio, 130 Fed. (2d), Page 5. (Federal Reporter, Oct. 5, 1942.)

JURISDICTION

The judgment of the Court below was entered October 6, 1942. The jurisdiction of this Court is invoked under Section 28, U. S. C. A. Sec. 347.

SUMMARY STATEMENT OF MATTER INVOLVED

The controversy arises out of an action against the petitioner, as surety on an Administrator's bond, brought by the respondent, as the successor Administrator, and involves the method of determining the surety's liability.

In 1936, Daniel I. Harshman, Administrator De Bonis Non, W.W.A., of the Estate of Robert Chambers, Deceased, admitted that he had made personal use of the Estate's moneys and was short in his accounts, and then died by his own hand. Thereafter, your respondent was appointed his successor and caused to be filed, on his behalf, a tenth and final accounting. Respondent then commenced a special or ancillary proceeding, under the Ohio law, by filing exceptions to the tenth and final account of the deceased Administrator, to cause inquiry to determine the amount of the loss by the Probate Court. These proceedings were terminated by the Probate Court of Montgomery County, Ohio, on December 1, 1939, wherein it rendered judgment against Daniel I. Harshman, Deceased, or his estate, and determined the amount that he had actually embezzled in the sum of $17,717.00, and in addition thereto, ordered that Mr. Harshman, or his estate, pay damages as interest on the withdrawals, and return previously allowed compensation, in the sum of $13,000.00. (R-149)

The surety, thereupon, commenced an action in the United States District Court praying for a declaratory judgment to determine its liability, if any, and the extent.

(R-1) Subsequently the respondent filed its action in the Common Pleas Court of Montgomery County, Ohio, based upon the judgment obtained in the Probate Court against Mr. Harshman and his estate, in the sum of $30,372.58, and endeavored to collect from your petitioner, the actual loss of $17,717.00, and in addition thereto, the penalties assessed against the deceased Mr. Harshman and his estate, of about $13,000.00. (R-22) This later action was removed to the Federal District Court on the ground of diversity of citizenship, and consolidated by agreement with the declaratory judgment action. (R-29)

At the trial the surety, your petitioner, contended that the action, on the judgment of the Probate Court, was improperly laid, since it was necessary to maintain it as a cause of action arising out of its surety contract or bond, and that a breach of the bond must be proven, together with the resulting loss of the actual amount embezzled. Further, that the $13,000.00 item, representing damages allowed by the Probate Court, was a separate issue to be determined as to whether or not the bond or contract of the surety extended to cover these penalties.

It was urged by the respondent that the doctrine of res judicata applied, by reason of the fact that the surety had been compelled to defend and did defend the proceeding on exceptions in the Probate Court, to determine the amount of the actual shortage, and, in view thereof, it was not necessary to bring the action on the bond, as above set forth, but merely to allege and prove the rendition of the judgment by the Probate Court against Mr. Harshman or his estate, in the total sum of $30,372.58, without pleading or presenting evidence of a breach of the bond, any actual loss, and additional damages by way of penalty.

Both the Federal Trial Court and the Circiut Court of Appeals agreed with the theory of the respondent, and the Judgment was rendered and affirmed in the lump sum, including the penalty, without requiring the respondent to prove a case as by a breach of the bond, and without permitting the surety to defend to determine if the penalty of about $13,000.00 was covered by its contract or recoverable under the law.

QUESTIONS PRESENTED

(1) Will the doctrine of res judicata deprive the surety of its defenses to litigate on its bond, in a second action between the same parties, when the latter action is on a different claim or demand, or cause of action?

(2) Is a prior judgment res judicata to a litigant when that judgment was not rendered upon the merits or the issues propounded in the second action?

(3) In such respect (2 above), the Court below is in direct conflict with the Circuit Court of Appeals, Eighth Circuit, in *Water, Light & Gas Co.* v. *City of Hutchinson,* 160 Fed. 41; *Harrison* v. *Remington Paper Co.,* 140 Fed. 385; the Fifth Circuit Court of Appeals in *Kelliher* v. *Stone and Webster,* 75 Fed. (2d.)—331; and the Fourth Circuit Court of Appeals in *Bitner* v. *West Virginia Pittsburgh Coal Co.,* 15 Fed. (2d.) 652.

(4) The United States Circuit Court of Appeals below, did not follow the decision of this Honorable Court in *West* v. *Am. Tel. & Tel. Co.,* 311 U. S. 223, when it approved the law as pronounced by an Ohio Appellate Court which was contrary to the statutes and decisions of the Supreme Court of Ohio.

(5) Must respondent, to successfully maintain an action on the bond of the surety, allege and prove facts that

constitute a breach of the bond, together with the resulting loss to the obligee occasioned by each breach? The District Trial Court found in the affirmative on this point as propounded by your petitioner. The Circuit Court of Appeals, below, however, finds, in effect, in the negative.

(6) The Circuit Court below found that "The determination of the liability of the Administrator", is "a prerequisite to this suit on the bond." (R. page 366) Yet, it affirmed the decision of the District Trial Court which found to the direct contrary and which held that the failure of the deceased Administrator or his Estate to pay a judgment rendered against him, in a proceeding commenced against him after his death, constituted a breach of the bond.

SPECIFICATION OF ERRORS TO BE URGED

It is submitted by your petitioner that the foregoing questions to be presented disclosed errors of the Court below prejudicially harmful to your petitioner in the following respects, to-wit:

> (1) The Circuit Court below erroneously held that the controversy which arose in the nature of the ancillary or special proceedings as exceptions filed to the tenth and final account of the deceased Administrator to inquire into the amount of a shortage of such fiduciary, involved the same claim, demand or cause of action as presented in the action below on the bond to determine the liability of your petitioner as surety.

While the exceptions of the respondent, in the Probate Court, sought to determine the amount Mr. Harshman owed the estate, it also included a prayer for a judgment against your petitioner on its bond. This latter issue was not tried to the State Courts or submitted, and no judg-

ment against the surety rendered thereon in those proceedings. The only issue actually determined was that Mr. Harshman had embezzled $17,717.00, and the judgment determined and added a penalty of $13,000.00 for his personal use of such funds.

Since the second action must be upon the bond to determine the surety's liability with respect to the actual shortage of $17,717.00, and its liability, if any, for the penalties assessed, it is upon a different claim or demand and cause of action, and the first judgment will not operate as an estoppel in such respect. (Authorities cited in brief, page 16).

(2) The Court below, in holding that where different proof is required to sustain the state action on the exceptions and the one at bar, a judgment in the state action is a bar or estoppel to the latter action is in direct conflict with the Circuit Court of Appeals for the Fourth, Fifth and Eighth Circuits. (See No. 2, Questions Presented, supra), thereby permitting the respondent to maintain a suit on the judgment of the State Court, and thereby depriving the petitioner of the right to have an action brought upon the bond, for a breach thereof, and depriving it of its necessary defenses thereto.

(3) The Circuit Court below correctly held that the action on exceptions in the State Court was a determination of the liability of the Administrator, and was a prerequisite to the suit on the bond, yet did not reverse the decision of the District Trial Court, which held to the contrary, thereby enjoining your petitioner from having brought against it a proper suit on the bond for a breach thereof and enabling it to submit its defenses thereunder.

(4) This Court Reversed the Circuit Court below in *West* v. *Am. Tel. & Tel. Co.*, supra, and held that Federal Courts must accept as the Law of a State, the law as pronounced by the statutes or the highest

Court of that State. The Circuit Court below erroneously held that it was bound to accept the law as pronounced by the Court of Appeals in the state action, which nevertheless, was contrary to the provisions of the statutes and pronouncement of the Supreme Court of Ohio, on the same question, thereby depriving the petitioner of the right to have determined, in an action upon the bond, whether the issue with respect to the penalties claimed, in addition to the actual loss, as far as the surety was concerned, was made possible by a vacation of a judgment by the State Court in a manner provided by law of Ohio. (Authorities cited in Brief, P. 21).

(5) The District Trial Court correctly held that the petitioner as surety was entitled to require the respondent to allege and prove facts which constituted a breach of its bond, and submit evidence in proof of a loss occasioned by each breach but did not require it done. The Circuit Court of Appeals below erroneously held to the contrary. The respondent, therefore, was permitted to merely allege the judgment it obtained in the State Court, then claim that res judicata estopped the surety and, thereby, it was not required to prove the bond, its conditions, a breach and resulting loss by reason thereof. The penalties of $13,000.00 were included in the lump sum of the judgment, and the surety deprived of offering a defense to any of such claims and penalties.

(6) The Court below erred in rendering judgment for the respondent.

REASONS FOR GRANTING THE WRIT

(1) That the surety be granted its day in Court.

(2) That it have its constitutional right to be properly sued on its bond for a breach thereof, and permitted to offer for judicial determination any and all defenses it may have.

(3) That is may be permitted to have tried to determine

if its principal's embezzlement of $17,717.00 constituted a breach of the bond and if it was liable for such amount.

(4) That is may be permitted to have tried, on issues properly joined, to determine, whether or not the penalties of $13,000.00, found against the dead fiduciary, were proper claims covered under the bond or had been barred by an Ohio Statute of Limitation.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings, herein; and that the judgments of the United States Circuit Court of Appeals for the Sixth Circuit and of the District Court for the Southern District of Ohio, Western Division, be reversed and for such other and further relief as this Honorable Court may find just and proper.

A. K. MECK,
CLIFFORD R. CURTNER,
Dayton, Ohio,
Counsel for Petitioner.

IN THE

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OCTOBER TERM, 1942

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
Petitioner,

vs.

THE WINTERS NATIONAL BANK AND TRUST COMPANY OF DAYTON, OHIO, as Administrator de bonis non with will annexed of the Estate of Robert Chambers, Deceased,
Respondent.

BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Comes now, The Massachusetts Bonding & Insurance Company, petitioner herein, and in support of its petition for a writ of certiorari to the United States Circuit Court, Sixth Circuit, submits the following brief.

OPINION BELOW

The opinion, of the Court below, is reported in Massachusetts Bonding & Insurance Co. vs. The Winters National Bank & Trust Company of Dayton, Ohio, 130 Fed. (2d.), Page 5; the decision of the Ohio Appellate Court, in the state proceeding, may be found in Re The Estate

of Chambers, 16 O. O., 519, 36 N. E. (2d.), 175; 32 O. L. Abs.—252; Motion to certify overruled, 136 O. S. 202, 24 N. E. (2d.), 601.

JURISDICTION

The judgment of the Court below was entered October 6, 1942. The jurisdiction of this Court is invoked under Judicial Code, note 240, as amended.

STATEMENT OF THE CASE

We have previously submitted to the Court, under our summary statement of issues, contained in the petition for the writ, a concise statement of the history of this case. For brevity, we re-submit the summary statement of issues (Petition, P. 2), in addition to the following.

It is the claim of the respondent, the obligee, that its predecessor embezzled $17,717.00 of the estate funds, and then died by his own hand. Irrespective of the actual amount of the loss, the obligee desires a judgment against your petitioner for $30,372.58. It arrived at this exorbitant figure by adopting the method of filing exceptions to the tenth and final account of the principal, and opening up two old partial accounts which had been settled and approved and became res judicata by final judgment. After it had opened those old accounts, it had the Probate Court order the deceased principal to return the Administrator's fees, which the Probate Court had allowed him at the time those accounts were filed. In addition, interest was added to those fees from the date of withdrawal. It is the claim of the respondent that the judgment settling the two prior accounts was vacated for the reason that the principal did not have the cash on hand that he fraudulently charged himself with in the "Balance on hand" of his said account.

Your petitioner claims that a period of over two years before the principal died had elapsed since he filed and

had approved and settled his ninth account, and that the statute and the Supreme Court of Ohio hold that no Court has "jurisdiction" to set aside, on the ground of fraud, such a judgment after two years from the date it was entered. Therefore, it is incumbant upon the respondent to start with the balance the Administrator charged himself with at the conclusion of the ninth accounting period, to determine if there was estate funds missing; that if there was embezzlement, such fact must be alleged and it must prove the embezzlement constituted a breach of the bond, as well as the loss occasioned by such breach, which would be, in this event, the sum of $17,717.00; and that any claim for the difference between the judgment sued on, in the case at bar, and the actual amount embezzled, would represent special damages or penalties, which would necessitate specific allegations in the pleading, and proof to determine that it was covered under the terms of the bond. Likewise it is true that if there were any other acts of the deceased principal, which constituted a breach of the bond, they must be specifically alleged and proved, and any loss occasioned thereby would be an additional amount of recovery on the bond. This is the only method provided by the statutes, and the Supreme Court of Ohio, to permit a succeeding Administrator to recover on a bond.

It is the claim of the respondent that it need not allege or prove any breach of the bond, but may predicate its action on the judgment which it had recovered in an ancillary proceeding commenced in the Probate Court against the deceased Administrator, after his death, and in which this surety, as well as the Administrator of the principal's non-existent estate, were made parties. In that proceeding the respondent prayed to have an accounting

on the amount of assets charged to Mr. Harshman at the time his ninth account was settled; to vacate the prior judgment settling the eighth and ninth account of the principal and to cause him to return compensation previously approved and allowed him; and to assess interest as damages on the compensation, as well as all withdrawals. No judgment was recovered against the surety, in the proceeding on exceptions, but the respondent did obtain a judgment against the deceased Mr. Harshman "or" his Administrator.

It was further offered by the respondent that it was not necessary for it to allege or prove any acts which constituted a breach of the bond, and resulting loss thereunder, and that it is immaterial whether the Probate Court had jurisdiction of the subject matter when it vacated the eighth and ninth judgment, for the reason that that Court and the Court of Appeals of Montgomery County both determined that it did have jurisdiction, irrespective of the fact that the Supreme Court of Ohio hold that a void judgment may be collaterally attacked.

SPECIFICATION OF ERRORS

I. The application of the doctrine of res judicata has deprived your petitioner of its defenses to litigate on its bond.

II. The Court below is in conflict with the U. S. Circuit Court of Appeals for the Fourth, Fifth and Eighth Circuits. Where a different proof is required to sustain the two actions, a judgment in one is no bar to the other.

III. The Circuit Court of Appeals did not follow the law pronounced in *West* v. *Am. Tel. & Tel. Co.*, 311 U. S. 223.

ARGUMENT

Specification of Errors No. 1

THE APPLICATION OF THE DOCTRINE OF RES JUDICATA HAS DEPRIVED YOUR PETITIONER OF ITS DEFENSES TO LITIGATE OF ITS BOND.

To consider this most important question, it is necessary to examine the pleadings in the State Court, as well as in the case at bar.

As previously pointed out, the respondent commenced the ancillary and special proceedings in the Probate Court by the filing of exceptions to the tenth and final account of the deceased Administrator. Therein it prayed as follows:

> "charging the estate of Daniel I. Harshman, deceased, and the surety upon the official bond of Daniel I. Harshman, etc., with the principal amount of said shortage, to-wit: $17,717.98." (R. 149.)

In addition to the amount of the actual loss as indicated in the foregoing prayer, the respondent also prayed for penalties for the use of said funds as indicated in the exceptions. (R. 144-148-151-153.)

Your petitioner twice attacked the jurisdiction of the Court over the subject of the action and the person of the surety by demurrer, and the Probate Court, as well as the Common Pleas Court overruled the same (R. 154-155, 193-194), holding that it had jurisdiction to determine a cause of action on the surety bond in such ancillary proceedings, irrespective that the Supreme Court of Ohio had definitely held that a surety was neither a necessary or proper party in summary proceedings by way of exceptions to an account, and had no standing or right in such matters.

> "The surety on the bond was not a party to that proceeding and he had no right to be." *Smith* v. *Rhodes,* 68 O. S., 505."

No judgment was rendered against the surety in the proceedings below. The judgment of the Probate Court, as amended, reads as follows:

> "The Court further finds that there is due and owing from said Deniel I. Harshman, deceased, or his estate, to The Winters National Bank & Trust Company of Dayton, Ohio, the immediate successor to Daniel I. Harshman, as Administrator d.b.n.w.w.a. of the estate of Robert Chambers, deceased, the sum of $30,372.58, with interest on $20,433.00 thereof at the rate of six per cent per annum from October 1, 1939, until paid." (R. 193)

The petition of respondent, in the case at bar, alleged specifically the proceedings had in the State Court, the judgment of $30,372.58 it received against the deceased principal or his estate, and prayed for a like judgment against the petitioner. (R. 26)

It will be observed that the petition does not contain an allegation as to specific breach of the bond, the actual amount embezzled or a separate claim for damages in the nature of the penalties found against the deceased principal or his estate in addition to the loss.

The Federal Trial Court held:

> "The only condition of the bond alleged is that Harshman should administer the testator's property according to law and the will of the testator. The only breach of the bond alleged is the failure to pay the amount so found due by the Probate Court." (R. 51)

We urged to the Circuit Court below, that if respondent had sued the surety, on its bond for a breach thereof,

as a separate issue in the State Court, as indicated by its prayer, that it was not successful therein, and it could not split a cause of action and bring the action at bar to collect the amount that had been previously determined. (See Petition for Rehearing R. 367 to 382.) The Circuit Court held as follows:

> "The determination of the liability of the Administrator while a prerequisite to this suit on the bond, is no part of the cause of action against the surety itself",

and further held,

> "While appellee in its exceptions in the Probate Court prayed for judgment against the surety, the prayer was not a proper part of the exceptions to the account and in no way constituted a suit on the bond. The Probate Court entered no judgment against the surety and treated the prayer for such relief as *surplusage*. The judgments of the higher state courts likewise, covered the liability of Harshman only." (R. 366)

It follows, therefore, that if the respondent did not sue the surety on its bond in the State Court and thereby split its cause of action, and the State Court treated the prayer as surplusage and further that the action on exceptions was merely a prerequisite to determine the amount Mr. Harshman may have been short before bringing an action on the bond, that the issues such as might be raised by an action for a breach of the bond, charging embezzlement and actual loss, and claiming penalties allowed in the State Court, was never determined by the State Court, and constitutes an entirely different cause of action, claim or demand.

It is a well settled principle of law that where the second action, between the same parties, is upon a differ-

ent claim or demand, or cause of action, that the judgment in the first action operates as an estoppel only as to the point or question actually litigated and determined.

Davis v. *Brown,* 94 U. S. 43.
Cromwell v. *Sac County,* 94 U. S. 351.
Bissell v. *Spring Valley Twp.,* 124 U. S. 225.
Nesbitt v. *Riverside Independent,* 144 U. S. 610.
McComb v. *Frink,* 149 U. S. 629.
Last Chance Mining Co. v. *Tyler,* 157 U. S. 683.
Roberts v. *Northern Pacific Ry.,* 158 U. S. 1.
Werlein v. *New Orleans,* 177 U. S. 390.
Virginia-Carolina Chemical Co. v. *Kirven,* 215 U. S. 252.
George A. Fuller Co. v. *Otis Elevator,* 245 U. S. 499.
Myers et al v. *International Truck Co.,* 263 U. S. 64.
Larsons v. *North Land Transit Co.,* 292 U. S. 20.

Effect on the Surety

By holding that the entire state proceedings were res judicata as to this surety and the bringing of an action on the judgment instead of on the bond, the surety could offer no defenses, and was thereby deprived of its day in court in violation of Article XIV of the Constitution, guaranteeing protection to petitioner of its properties, and Article I, Section 10, impairing the obligation to contract.

In analysis, it must be remembered that the actual amount the Administrator embezzled and which was proven was $17,717.00, whereas the judgment now affixed against it is for over $30,000.00 and includes interest charged back beyond old judgments and disallowance of previously allowed compensation.

If the action had been brought on the bond, necessity would require, in proper pleading, that the actual amount embezzled be set forth and the surety charged with the

specific breach of the bond in such amount. Likewise it would be necessary to *separately* claim the recovery of the penalties allowed by the State Court against the deceased Administrator or his estate for the $13,000.00, was a breach of the bond and proffer a provision of the contract covering that amount. Proof would follow to necessitate a judgment in the total amount. The surety would be permitted to offer in defense whatever might be available to it towards the original claim of the amount embezzled of $17,717.00. Most important it would be permitted to set forth Statutes of Ohio in Limitation to the claim of penalty, which reads:

> "Personal use of trust property prohibited. No fiduciary shall at any time, make any personal use of the funds or property belonging to the trust, and for any violation of this provision, he shall be liable and also his bond in an action for any loss occasioned by such use and for such additional amount by way of penalty not exceeding the amount of the loss occasioned by such use as may be fixed by the court hearing such cause. Such amounts shall be payable for the benefit of the beneficiary, if living, and to his estate if he be deceased."
>
> *Section 10506-47, General Code.*

> "Limitation of action. Any action under the next preceding section shall be brought not later than one year after the termination of the trust or the discovery of the fact of such loss."
>
> *Section 10506-48, General Code.*

The loss was first discovered in the estate on March 24, 1936 (R. 97).

This section was not considered by the Trial Court nor by the Circuit Court below on the ground that the respondent, from the nature of the issues raised by its plea on the judgment, was not seeking a penalty (R. 51-70, 363).

Of the $13,000.00 in penalties, approximately $8,000.00 represents compounded interest from back as far as 1928 on the various withdrawals and disallowed compensation.

An important fact is that first demand was made upon the surety on December 11, 1939 (R. 20).

It is a well settled principal of law that a surety whose undertaking obligated it contingently for unliquidated damages, is not considered in default until notice or demand, and interest does not begin to run until then. *U. S. v. Quinn,* 122 Fed. 65.

This Court in *Curtis* v. *U. S.,* 100 U. S. 119, in an action against sureties of a paymaster in the army, assigned as the breach of the conditions of his official bond that he did not when thereunto required, refund $3,320.02, with interest. He rendered his account November 30, 1865, when he left the service, and shortly thereafter died. On the subsequent adjustment of his account that sum was found due at said date. No demand therefor was made of his personal representative, and the sureties had no notice of the claim before service of the writ in the action. The adjustment was the only evidence of the sum due. Held: that the U. S. is entitled to recover that sum, but with interest only from the date of such service.

In Re: *Perelson,* 44 Fed. (2d.) 62, it was held that a surety for a Trustee was chargeable with interest on a defalcation only from the time the principal was cited for contempt, and when it failed to make good after the defalcation had been called to its attention.

In *Black Diamond Steamship Corp.* v. *Fidelity & Deposit Company,* 33 Fed. (2d) 767, it was held:

> "The principal may be liable at all events and, before compliance with the conditions, the interest on

his obligation may run from the time of his default. Interest against the surety should be calculated only from the time the surety is in default and he should not be considered in default until the conditions have been met and his liability determined and made known to him."

In *Massachusetts Bonding* v. *U. S.*, 97 Fed. (2d.), P. 379, the Court held:

> "A surety is required to do nothing until notified by the obligee of the principal's default but, if upon such notice surety unjustly withholds the amount, he is liable for interest at ordinary rate because of unjust retention of money."
>
> "Where performance is to be rendered on demand or any other condition precedent, interest as damages will not begin to run until demand or until occurrence or excuse of the condition." Restatement of Law of Contracts, 337.

It is very readily determined the prejudicial effect upon the surety in claiming res judicata because it was a party to the proceedings in the State Court to determine the amount of Mr. Harshman's shortage, and in this action for the recovery of the amount to be paid under the terms of the bond.

If the issues were properly joined in an action upon the bond against the surety, it would have a right to have legally determined by the Federal Courts whether or not Section 10506-47-48 G. C. estopped the respondent from recovering anything more than $17,717.00, or the actual amount embezzled. Likewise, it would have available to it as a defense, that a surety is not chargeable for interest until after formal demand is made and it then arbitrarily refuses to pay. At any rate, it could not be held for interest compiled some ten years before the actual loss was discovered and inquiry made into it.

It is also well settled that a principal may be charged with a great deal more than could be recovered on his surety bond.

> "A principal in a bond may be liable beyond the stipulations of the instrument, independently of the bond, but so far as his liability is in consequence of the bond and by force of its terms, his surety is bound with him." *Stovall* v. *Banks,* 10 Wallace, 583-588.

By this erroneous application of the law, the surety has been assessed $13,000.00 without being permitted to defend on the subject or issues.

Specification of Errors No. 2

THE COURT BELOW IS IN CONFLICT WITH THE U. S. CIRCUIT COURT OF APPEALS FOR THE FOURTH, FIFTH AND EIGHTH CIRCUITS. WHERE A DIFFERENT PROOF IS REQUIRED TO SUSTAIN THE TWO ACTIONS, A JUDGMENT IN ONE IS NO BAR TO THE OTHER.

Bitner v. *West Virginia Pittsburgh Coal Co.* (Fourth Circuit) 15 Fed. (2d.) 652.
Kelliher v. *Stone and Webster,* (Fifth Circuit) 75 Fed. (2d.) 331.
Water, Light & Gas Co. v. *City of Hutchinson,* (Eighth Circuit) 160 Fed. 41.
Harrison v. *Remington Paper Co.* (Eighth Circuit) 140 Fed. 385.

There can be no question but what an action on the bond requires different proof, for the issues are likewise not the same as in a special proceeding to determine if an Administrator is short in his accounts and how much.

The Circuit Court below is in direct conflict with the cases set forth above, since it held that we were concluded by the determination of the probate Court, irrespective of the fact of whether we were a formal party to the settlement proceedings or not. (R. 364)

Specification of Errors No. 3

CIRCUIT COURT OF APPEALS DID NOT FOLLOW THE LAW PRONOUNCED IN WEST v. AM. TEL. & TEL. CO., 311 U. S. 223.

The Court below held that it was bound by the decision in the West case to follow the decision of the Court of Appeals rendered in the state action, (R. 363) and for this reason could not determine whether or not the State Courts had jurisdiction to vacate the Ninth Account Judgment.

It is our impression that the law as pronounced in the West case, is that Federal Courts are required to follow the law of the state as announced by the legislature or by the highest court of the state. In the absence of a statute or a decision of the Supreme Court of the state, it may then ascertain from all available data what the state law is and may consider the decisions of inferior courts.

Section 10501-17 G. C. of Ohio, provides:

> "The Probate Court shall have the same power as the Common Pleas Court to vacate or modify its orders or judgments."

Section 11631 G. C. of Ohio, provides:

> "That the Common Pleas Court may vacate its own judgments or orders after term 'for fraud practiced by the successful parties in obtaining a judgment or order.'"

Section 11640 G. C., provides that such a proceeding to vacate or modify a judgment or order as specified in Section 11631, "must be commenced within two years after the judgment was rendered or order made."

Section 10506-40 G. C., is similar to 11631 G. C., insofar as vacating judgment for "fraud" is concerned. One

applies to the Common Pleas Court, and the other to the Probate Court, but neither describe how or under what circumstances a judgment may be vacated for fraud.

Section 11640 G. C. is a part of "the grant of jurisdiction." This is the law of Ohio as provided by statute. It has been construed by the Supreme Court of Ohio in *Errett* v. *Howert,* 78 O. S., 109.

> "A probate Court, after term, loses jurisdiction over its judgments and does not again acquire jurisdiction to vacate the same on the ground of fraud, except within the time and manner provided by statute. Such a time limit is a limit on the grant of jurisdiction, and not simply a defense."

The Circuit Court below ignored *Errett* v. *Howert,* after holding that it did not apply because it is a guardianship case. The law announced in that case is general and applies in all actions.

> "It is the policy of the law that all controversies should reach speedy determination. The peace of society demands that the judgment of every court having jurisdiction of a cause should be a final adjudication of that cause unless it is reversed or vacated in the manner and by the methods provided therefore." *Crawford* v. *Zeigler,* 84 O. S., 224-231.

The Supreme Court of Ohio in *Eichelberger* v. *Gross,* 42 O. S., 549-554, announced that the law of Ohio to be:—

> "That a partial account is conclusive unless attacked in the mode provided by law."

No court has any "power" to vacate such a judgment in any manner other than provided by a statute. *Huntington* v. *Finch,* 3 O. S., 445-447.

It follows that the law announced by the Court of Appeals in the state action is only "datum" to be observed

by the Federal Court only when there is no statute or State Supreme Court pronouncement of the law on the subject. The Circuit Court of Appeals, therefore, erred when it accepted as the law announced in the Chambers estate, supra, to be "The Law of Ohio."

The effect of this holding, by the Court below, permits to be added to the actual amount embezzled by the principal, previously allowed compensation, which was approved when he filed his ninth account, and interest on withdrawals of his eighth account in 1928, and interest as well on the compensation, in this event about $4,500.00.

SUMMARY

We respectively submit that for the apparent errors of the courts below as set forth in the Petition for Writ of Certiorari and this supporting brief, your petitioner has been prejudicially deprived of substantial justice in the premises entitled to be heard on the merits by this Honorable Court.

Respectfully submitted,

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Dayton, Ohio,
Counsel for Petitioner.

No. 588.

Supreme Court of the United States

October Term, 1942.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
Petitioner,

vs.

THE WINTERS NATIONAL BANK AND TRUST COMPANY OF DAYTON, OHIO, as Administrator de bonis non with will annexed of the Estate of ROBERT CHAMBERS, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

CASES CITED.

TEXT AUTHORITIES CITED.

STATUTES CITED.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. INTRODUCTION.

The undersigned attorneys respectfully submit to this Honorable Court the following brief on behalf of the respondent, The Winters National Bank and Trust Company of Dayton, Ohio, as Administrator d.b.n. w.w.a. of the Estate of Robert Chambers, deceased, and in opposition to the Petition for Writ of Certiorari herein.

By way of explanation of the form and content of the following brief we wish to call the Court's attention to the following aspects of the petitioner's petition and brief:

First: The Summary Statement on page 2 of the petition, as supplemented in the Statement of the Case on page 10 of petitioner's brief contains what we believe to be an incom-

plete and inaccurate statement of the facts in this case, and is devoted largely to a garbled and argumentative statement of the respondent's contentions in the lower Court. Under these circumstances, we feel compelled to include in this brief a statement of the facts in this case.

Second: The petition states six questions which are alleged to be presented in this case, specifies six errors and assigns four reasons for granting the writ. An examination of the petition and its supporting brief shows that there is no very clear relation between the alleged questions and errors on the one hand and the reasons for granting the writ on the other hand; that the assigned reasons do not even attempt to bring this case within the categories set out in Paragraph 38 (5) of the Rules of this Court; and that petitioner has wholly misconceived the function of a supporting brief in that the argument in its brief here is devoted entirely to an effort to demonstrate error on the part of the lower Court, instead of an effort to demonstrate why this Court should review the case. Although it is our understanding that it is not the primary function of a brief in opposition to present or support a statement of the propositions of law upon which the decision of the lower Court is based, we ask this Court's indulgence in doing so in this brief with the conviction that such a statement will show clearly that a majority of the questions alleged by petitioner to be presented in this case are not in fact presented, that there is no merit in the petitioner's argument on any of the alleged questions, and no foundation for the reasons assigned by petitioner for granting the writ.

II. STATEMENT OF THE CASE.

The facts in this case are set out in detail in the Findings of Fact made by the District Court (R. 59, et seq.), and inasmuch as petitioner made no argument in the Circuit

Court that such Findings were erroneous, it may be assumed that petitioner concedes them to be correct. The following summary is taken from these Findings, with appropriate record references to documentary exhibits.

The general subject matter of this case is the question of petitioner's liability as surety upon a bond given by it to secure the performance by Daniel I. Harshman of his duties as Administrator d.b.n. w.w.a. of the Estate of Robert Chambers, deceased, which estate is being administered in the Probate Court of Montgomery County, Ohio. Petitioner became surety on Harshman's official bond on March 19, 1918 (Ex. 6, R. 110). During the course of his administration Harshman filed nine successive accounts in the Probate Court, the ninth having been filed on April 9, 1931, and settled on June 1, 1931. (Ex. 5, R. 110) On May 11, 1937, Harshman admitted that there were discrepancies in his management of the estate. He filed no further accounting of his administration and during the progress of an action for his removal as administrator, he committed suicide.

Having succeeded Harshman as Administrator of the Chambers Estate, respondent secured the appointment of Philip R. Becker as Administrator of Harshman's estate. On July 7, 1937, Becker filed in the Probate Court a tenth and final account of Harshman's administration of the Chambers Estate. (Ex. A-5, R. 115) Thereafter respondent and several beneficiaries of the Chambers Estate filed exceptions to this tenth and final account and to Harshman's eighth and ninth accounts, alleging embezzlement of estate funds and other acts of maladministration on the part of Harshman during the entire period covered by those accounts, and seeking the vacation of the settlement orders on the eighth and ninth accounts on the grounds that they contained errors and the settlement thereof had been procured by fraud on the part of Harshman. (Ex. A-6, R. 141) A copy

of the exceptions was served on petitioner and a time was set for a hearing thereon. Petitioner then filed in the Probate Court a demurrer to the exceptions on the grounds that the exceptions did not state facts sufficient to constitute a cause of action and that the court had no jurisdiction of the subject of the action. (Ex. A-8, R. 154) The demurrer was overruled and petitioner then filed an answer to the exceptions comprising a general denial and an affirmative defense that the proceedings were not brought within the time prescribed by law and were barred by law (Ex. A-12, R. 157), and also exceptions in its own behalf claiming that the tenth account should be amended to provide a compensation allowance for Harshman's services. (Ex. A-11, R. 156) Trial of the issues thus joined resulted in a decision which sustained certain of the exceptions filed on behalf of the beneficiaries and overruled petitioner's exceptions in their entirety. (Ex. A-13, R. 158)

From this decision petitioner prosecuted an appeal to the Common Pleas Court of Montgomery County, Ohio, and a judgment to substantially the same effect was rendered, finding a large amount of money due from Harshman, and directing Becker to file in the Probate Court an amended tenth and final account showing therein the amount so found due from Harshman. (Ex. B-8, R. 195) Petitioner then appealed to the Court of Appeals of Montgomery County, Ohio, and respondent and the beneficiaries filed a cross-appeal. The Court of Appeals affirmed the judgment with certain modifications to make it identical with the judgment originally rendered in the Probate Court (Ex. C-10, R. 336, reported under the name of *In Re Estate of Chambers*, 30 Ohio Law Abs. 420, 16 Ohio Opinions 519, 36 N. E. 2nd 175). Thereafter petitioner attempted to secure a review of the case by the Supreme Court of Ohio both by way of motion to certify and by appeal as of right, but the ap-

peal was dismissed (Ex. C-15, R. 352, reported at 136 O. S. 202) and the motion to certify was overruled (Ex. C-14, R. 351), leaving the judgment of the Common Pleas Court, as modified and affirmed by the Court of Appeals, in full force and effect. Appropriate mandates went down to the Probate Court, and in accordance therewith an amended tenth and final account was filed in the Probate Court. (Ex. A-15, R. 179) Due notice of the filing of this account and a copy thereof was served upon the attorneys for petitioner prior to the filing thereof. In an entry of settlement filed on December 1, 1939, the Probate Court found that said amended account had been filed in conformity with the judgment of the Common Pleas Court, as modified and affirmed by the Court of Appeals; that said account had been properly examined and advertised according to law and the rules of the court; that no exceptions thereto had been filed and the same was true and correct; and that there was due and owing to respondent, as Harshman's successor, the sum of Thirty Thousand Three Hundred Seventy-two and 58/100 Dollars ($30,372.58), with interest on Twenty Thousand Four Hundred Thirty-three Dollars ($20,433.00) thereof at the rate of six per cent (6%) per annum from October 1, 1939, until paid. (Ex-16, R. 192). No appeal was taken from this order of settlement within the time required by law, and the same is now in full force and effect.

On December 11, 1939, respondent demanded payment from the surety and from Philip R. Becker, as Administrator of Harshman's estate, of the sum so found due by the Probate Court, with which demand both of them failed, and still fail, to comply.

On December 21, 1939, petitioner filed its complaint against respondent in the District Court seeking a construction of its surety bond and a determination of its liability thereunder by way of declaratory judgment (R. 1), setting

up such defenses as improper procedure in the preceding state court litigation, lack of jurisdiction of the state courts, statutes of limitation, and laches on the part of the beneficiaries of the Chambers Estate. On December 22, 1939, respondent filed its petition in the Common Pleas Court of Montgomery County, Ohio, against petitioner upon the latter's surety bond alleging a breach in the condition of the bond that Harshman should administer the testator's property according to law and the will of the testator, in that Harshman's administrator had failed to pay to respondent the amount found due from Harshman upon the settlement by the Probate Court of Harshman's amended tenth and final account. (R. 22) This action on the bond was removed by petitioner from said state court to the District Court below. (R. 22, et seq.) Thereafter respondent filed its answer to petitioner's complaint for declaratory judgment, setting up in detail the preceding state court litigation on exceptions and alleging that all matters passed upon by the state courts were *res judicata* insofar as they determined Harshman's liability, and that the entry of settlement of Harshman's amended final account was conclusive and binding upon petitioner. (R. 6, et seq.) Petitioner then filed its answer to respondent's petition on the bond, setting up therein the same defenses to its liability which it had asserted in its complaint for declaratory judgment. (R. 29, et seq.) The District Court then consolidated the two cases for all purposes. (R. 29) A jury having been waived, the entire matter was tried to the Court.

Pursuant to a pre-trial conference, the District Court rendered a decision on certain preliminary questions of law (R. 35), and this decision, overruling all of petitioner's defenses to its liability, substantially disposed of the case. Thereafter the District Court rendered a final decision with Findings of Fact and Conclusions of Law (R. 56), pursuant

to which final judgment was rendered against petitioner on its bond in the same amount which the Probate Court had found due from Harshman upon the settlement of his amended final account. (R. 85) Upon appeal by petitioner to the Circuit Court, the judgment was affirmed. (R. 359)

III. PROPOSITIONS OF LAW SUPPORTING DECISION OF CIRCUIT COURT.

A. The order of the Probate Court of Montgomery County, Ohio, approving and settling the amended tenth and final account of Harshman and determining the amount due from him to respondent as his successor, is conclusive and binding upon petition, and the nature and amount of such liability cannot be again inquired into in this action on petitioner's bond; and this would be true even if petitioner had not been a party to the proceedings on exceptions which preceded the settlement of this amended account and had not had notice of the filing of the same. This is a matter governed solely by local Ohio law and this proposition has been conclusively established by the following Ohio cases:

Braiden v. *Mercer*, 44 O. S. 339, 7 N. E. 155.
Slagle v. *Entrekin*, 44 O. S. 637, 10 N. E. 675.
Smith v. *Rhodes and Wilt*, 68 O. S. 500, 68 N. E. 7.
United States Fidelity and Guaranty Company v. *Wood*, 35 O. App. 224, 172 N. E. 383, motion to certify overruled March 26, 1930.
Smith v. *Worley*, 12 O. App. 367.
Cook, Adm'r., v. *Shanower*, 49 O. App. 227, 197 N. E. 122.

B. The failure of Harshman or his administrator to pay the amount determined by the Probate Court to be due from Harshman upon the settlement of his amended final account constitutes a breach of the bond. The respondent's petition

on the bond alleges a straight cause of action for the recovery of the amount so found due from Harshman. The only condition of the bond alleged is that Harshman should administer the testator's property according to law and the will of the testator, and the only breach of the bond alleged is the failure to pay the amount so found due by the Probate Court. Since this is a matter of local Ohio pleading and practice dealing with an Ohio form of fiduciary bond, it is governed by Ohio Law. On this point the Supreme Court of Ohio in the case of *Slagle* v. *Entrekin*, 44 O. S. 637, 10 N. E. 675, held that the averment of a failure of an administrator, who has resigned, to pay to his successor the amount found due from him in the settlement of his accounts, is a sufficient assignment of breach of the condition in his bond 'to administer according to law' the assets of the estate. It is stipulated in the record (R. 98) that the amount found due from Harshman has not been paid, and in the light of the rule of pleading set out in the Slagle case, it is clear that a breach of the bond has been properly pleaded and proved, so as to entitle the respondent to recovery therefor from petitioner.

C. Entirely apart from Proposition A above, the judgments and orders of the state courts in the proceedings upon exceptions to Harshman's accounts are *res judicata* insofar as they determined the question of the nature and amount of Harshman's liability and the question of the jurisdiction of the state courts to make those orders, and petitioner cannot now be heard to assert in this action on the bond any of the defenses on these questions which it did assert or could have asserted in the proceedings on exceptions. The petitioner appeared in the proceedings on exceptions, filed a demurrer and an answer, defended the case at the trial and appealed three times from adverse deci-

sions. It is now foreclosed under the rules laid down in the following authorities:

23 Ohio Jurisprudence, 961, 969, 976, 985.
Davis v. *Mabee*, 32 F. 2d 502, CCA-6.
Conn v. *Ringer*, 32 F. 2d 639, CCA-6.
Bolles v. *The Toledo Trust Company*, 136 O. S. 517, 27 N. E. 2d 145.
Stoll v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104.
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263.
C. & C. Bridge Co. v. *Sargent*, 27 O. S. 233.
Swenson, et al, v. *Cresop*, 28 O. S. 668.
Mengert v. *Brinkerhoff*, 67 O. S. 472, 66 N. E. 530.
Rothman v. *Engel*, 97 O. S. 77, 119 N. E. 250.
Ostrander-Seymour Co. v. *Grand Rapids Trust Company*, 50 F. 2d 567, CCA-6.

D. The decision of the state Court of Appeals under the rule of *West* v. *American Telephone & Telegraph Company*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, is controlling on the Federal Courts insofar as that decision is applicable to this suit on the bond, entirely apart from propositions A and C above. In view of the fact that the Supreme Court of Ohio declined to review this decision of the state Court of Appeals in the proceedings on exceptions, the decision of this Court in the case of *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284, is particularly pertinent.

IV. ARGUMENT.

In subdivision A of the following Argument, we will discuss the specifications of error argued in petitioner's brief; and in subdivision B we will discuss the questions alleged to be presented and the reasons assigned by petitioner for granting the writ.

A. Argument on Petitioner's Specifications of Error.

Although petitioner specifies six errors in its petition, it has argued only three in its brief, and we will argue them in the order presented in petitioner's brief.

1. Specification of Error No. 1.

Here petitioner says that "the application of the doctrine of *res judicata* has deprived your petitioner of its defenses to litigate on its bond." We interpret this peculiarly worded statement to mean that petitioner claims it has been deprived of an opportunity to present defenses in respondent's suit on the bond; and this interpretation is borne out by the assertion at various places in petitioner's brief that respondent's suit in the District Court was on the judgment rendered in the state court proceedings on exceptions rather than upon the bond. In making this contention petitioner misconceives the relationship between the state court proceedings and the action on the bond. The purpose and result of the proceedings on the exceptions was to determine the nature and amount of Harshman's liability, and the purpose of the present action on the bond is to collect the liability so determined from the petitioner because of its principal's failure to pay that liability. Petitioner attempted to confuse both the District Court and the Circuit Court on this point, but was unsuccessful in each instance. In response to a claim made in the District Court that the suit was on the judgment rather than the bond, the District Court said at R. 52:

> "The action, however, is not on a judgment but, as heretofore stated, on the bond for recovery of the amount found due from Harshman by the Probate Court on the settlement of the amended final account."

The same distinction was noted and observed by the Circuit Court when it said at R. 366:

> "The probate court entered no judgment against the surety and treated the prayer (against the surety) for such relief as surplusage. The judgments of the higher state courts, likewise, covered the liability of Harshman only. The determination of the liability of the administrator, while a prerequisite to this suit on the bond, is no part of the cause of action against the surety itself. The appellee proceeded in exact conformity with Ohio precedent of the highest authority in determining the amount due from Harshman on exceptions to his account and in filing a subsequent suit against the surety to recover the amount thus found due." (Citing Ohio cases)

Bearing in mind this distinction between the purpose and result of the proceedings on exceptions and the purpose of the suit on the bond, it is apparent that petitioner has been deprived of no opportunity, under the doctrine of *res judicata* or otherwise, to present defenses to its liability on the bond. What petitioner fails to recognize, in claiming it has been so deprived, is that the proceedings on exceptions determined Harshman's liability alone, and not the liability of petitioner. The doctrine of *res judicata* was applied by the lower Courts in this action on the bond only to the extent of precluding petitioner from relitigating any matters which had been previously determined with respect to Harshman's liability, and rightly so. The doctrine was not applied to prevent petitioner from asserting any defenses to its liability, as distinguished from that of Harshman. Petitioner invoked the jurisdiction of the federal courts with its complaint for declaratory judgment for the sole purpose of presenting defenses to its liability, and it likewise had ample opportunity to, and did, present its defenses by means of its answer to

respondent's petition on the bond. Having done so, and having had all its defenses passed upon by the lower courts, petitioner ought not now be heard to complain that it has been deprived of any opportunity to be heard.

Under the heading of "Effect on the Surety" on page 16 of its brief, petitioner continues its argument on this point by claiming that it has been deprived of two specific defenses, namely, that the action on the bond is barred by the limitation contained in Section 10506-48 of the General Code of Ohio, and that the petitioner is not liable for interest on any of Harshman's withdrawals until after a demand had been made on it.

With respect to the defense of limitations it may immediately be noted that as a matter of fact this defense was specifically presented to and passed upon by the lower courts. On this point the Circuit Court said at R. 362:

> "Section 10506-47, General Code, the only section to which the limitation of 10506-48 is applicable, provides an additional remedy against a fiduciary who makes 'any personal use of the funds or property belonging to the trust' for recovery of 'any loss occasioned by such use and for such additional amount by way of penalty * * * as may be fixed by the court * * *.' The District Court correctly held that since the appellee did not seek a penalty, Sections 10506-47 and 48 were not applicable. The instant case is governed by Section 11226, General Code, which provides that an action on the official bond of an administrator shall be brought within ten years after the cause accrued. There is no contention that ten years have expired."

With respect to the defense that it is not liable for interest until after a demand had been made on it, petitioner has fallen into error in failing to distinguish between interest which may be charged against the principal and interest

which may be charged against the surety. Beginning on page 18 of its brief, petitioner cites authorities for the proposition that a surety is not liable for interest until after demand on it, and then points out that no demand was made in this case until December, 1939; but that rule does not by any means indicate that a surety is not liable for interest found to be due from its principal. The cases which petitioner has cited all involve either situations where an attempt has been made to charge the surety with interest beyond the penal sum of its bond, or situations where an attempt was made to charge the surety with interest which was not due from its principal. Contrast this with the case at bar where the total recovery sought is about one-sixth of the penal sum of the bond, and where the interest objected to by petitioner was specifically found by the Probate Court to be due from the principal. Petitioner has failed to cite a single case to support its position and therefore is in no position to claim that it has been deprived of a meritorious defense.

As a final answer to petitioner's claims with respect to these two defenses, it may be pointed out that both are in reality defenses to Harshman's liability rather than to petitioner's liability. Hence they can avail petitioner nothing in this action on the bond because, as hereinabove demonstrated, the rule is well settled in Ohio that an order by a probate court settling an administrator's final account and fixing the amount due from him is conclusive and binding upon his surety and the nature and amount of that liability cannot be again inquired into in an action on the surety bond for the recovery of the amount so found due. Likewise both of these defenses to Harshman's liability either were or could have been presented in the proceedings on exceptions, and hence petitioner ought not now be heard to assert them again in this action.

2. Specification of Error No. 2.

Under this specification petitioner sets out federal cases purporting to show that where different proof is required to sustain two actions, a judgment in one is no bar to the other, and then says that the Circuit Court here is in conflict with them because it held petitioner to be bound by the determination by the Probate Court of Harshman's liability. No such conflict is present in this case. This decision by the Circuit Court is based upon the well-established local Ohio rule that a determination by the probate court of the amount due from an administrator on the settlement of his accounts is conclusive and binding upon his surety in an action on the bond. Petitioner well knows this to be the Ohio rule and nowhere in its brief does it make any argument or cite any authorities to the contrary.

It is apparent that petitioner is confusing this rule with the doctrine of *res judicata*. While the two may seem to be closely akin, they are distinguishable for in Ohio the rule is that the surety is bound by the settlement order whether or not it is a party to the proceedings leading up to the settlement order, while *res judicata* can only be applied where the person against whom it is to be asserted was a party to the prior litigation. In this connection it may be noted that in this case petitioner was a party to the proceedings on exceptions which led up to the settlement of Harshman's amended final account. By way of conclusion as to this point, it should be pointed out that it is inconceivable that petitioner was not familiar with this Ohio rule as to the binding effect of a probate court settlement order, for otherwise it would never have appeared and defended the previous litigation with such vigor, but would simply have made its defense in this action on the bond.

3. Specification of Error No. 3.

Although this specification states that the "Circuit Court of Appeals did not follow the rule pronounced in *West* v. *Am. Tel. & Tel. Co.*, 311 U. S. 223", the gist of petitioner's complaint seems to be not so much that the Circuit Court did not follow the rule in the West case, but rather that it followed the wrong case in determining what the Ohio law is. Our position on this matter is that all the issues in this case are strictly local in their nature, and that under the rule announced by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the statutes and case law of Ohio are controlling in the determination of those issues. As we have heretofore stated, we contend that the lower courts were entirely right in holding the decisions of the state courts in the proceedings on exceptions to be *res judicata* in this action insofar as they fixed Harshman's liability, but even if this were not so, we submit that the decision of the state Court of Appeals in the proceedings on exceptions is controlling in this case. In view of the fact that the Supreme Court of Ohio overruled petitioner's motion to certify the record and dismissed its appeal from that decision, the following statement from the case of *Stoner* v. *New York Life Insurance Company*, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284, is particularly pertinent:

> "We have recently held in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, must follow the decision of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. *West* v. *American Teleph. & Teleg. Co.*, Nos. 44, 45 (311 U. S. 223, ante, 139, 61 S. Ct. 179); *Fidelity Union Trust Co.* v. *Field*, No. 32, 311 U. S. 169, ante,

> 109, 61 S. Ct. 176); *Six Cas. of Cal.* v. *Joint Highway Dist.* No. 267, (311 U. S. 180, ante 114, 61 S. Ct. 186). In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties and the highest court of the state has refused review."

Petitioner's particular complaint in this respect is that in procuring a determination of Harshman's liability, by means of filing exceptions to his former accounts, respondent pursued the wrong procedure and could only have accomplished the vacation of former accounts by a proceeding under Section 11631 of the General Code of Ohio, to which the limitation in Section 11640 of the General Code of Ohio would have been applicable; in short, that the state courts had no jurisdiction to vacate the settlement of the former accounts. The same claim was made to the state Court of Appeals, which disposed of it as follows (R. 327):

> "It is our determination that the exceptors are rightfully invoking their remedy through exceptions to Account No. 10, with requests that Accounts Nos. 8 and 9 be opened up for correction of errors or mistakes and fraud on the part of Harshman, Administrator * * *."

Under the rule of the Stoner and West cases, supra, this flat determination of this issue is controlling in this action, and the Circuit Court correctly so held. But at petitioner's insistence, the Circuit Court went further and examined this claim of lack of jurisdiction to vacate the former settlement order, and found it to be without merit. (R. 363). The Ohio cases relied upon by the Circuit Court fully support its conclusion and need not be set out here. It is sufficient to point out that in petitioner's brief on this point there is, in the words of Mr. Justice Murphy in the Stoner case, supra,

an "absence of convincing evidence that the highest court of the state would decide differently". It is apparent, therefore, that petitioner has no ground for complaint on this score.

B. On petitioner's presentation of Questions and Reasons for Writ.

The first three of the questions alleged by petitioner to be presented in this case all relate to the application of the doctrine of *res judicata* in this case, and they all boil down to a renewal of petitioner's claim that this doctrine has been applied in this case so as to deprive it of an opportunity to present defenses to its liability on its bond. We strongly contend that none of these questions is actually presented in this case. They are present only in petitioner's imagination by reason of the fact that, as we pointed out in our argument on petitioner's first specification of error, petitioner is confused as to the relationship between the proceedings on exceptions and this suit on the bond. The purpose and result of the proceedings on exceptions was to fix Harshman's liability, and the purpose of this action on the bond is to collect that liability from petitioner. The settlement order by the Probate Court fixing Harshman's liability is conclusive on petitioner, and apart from this rule, petitioner is estopped by the doctrine of *res judicata* from relitigating in this action any defenses as to Harshman's liability which were ruled upon by the state courts in the proceedings on exceptions; but this does not by any means preclude petitioner from setting up in this action on the bond any defenses which it may have to its liability, as distinguished from Harshman's liability. That petitioner was not so precluded is proved by the fact that it not only had ample opportunity to, but actually did, present to the lower courts

all defenses to its liability it had available. There is, therefore, no ground for petitioner's claim that it has been deprived of any opportunity to be heard, and hence no such question is actually presented in this case.

The fourth question alleged by petitioner to be presented is merely a statement to the effect that in applying the rule of the West case, the Circuit Court followed the decision of the state Court of Appeals in the proceedings on exceptions rather than other Ohio authorities which petitioner alleges to be decisive of the Ohio law. Inasmuch as petitioner was unable to persuade the Supreme Court of Ohio to review this decision of the state Court of Appeals, there is little reason to believe that the Supreme Court would have decided differently, and hence the Circuit Court in this case was entirely correct in following this decision by the state Court of Appeals.

Petitioner's fifth and sixth questions both appear to be concerned with whether or not respondent properly pleaded and proved a breach of the surety bond, and they claim that there is some conflict on this question between the decisions of the District Court and the Circuit Court on this matter. This point was determined by the District Court in the following quotation from its decision at R. 51:

> "The Bank's action (Cause No. 64) is one on the bond for recovery of the amount found due from Harshman by the Probate Court on the settlement of the amended final account. The only condition of the bond alleged is that Harshman should administer the testator's property according to law and the will of the testator. The only breach of the bond alleged is the failure to pay the amount so found due by the Probate Court. This is a proper pleading. *Slagle* v. *Entrekin*, 44 O. S. 637."

Since it is admitted in the record that both petitioner and Harshman's administrator refused upon demand to pay the amount so found due, it is obvious that a breach of the bond has been properly pleaded and proved, so as to entitle respondent to a recovery of that amount. The Circuit Court affirmed this decision by the District Court, and we are unable to find any foundation for petitioner's statement that the Circuit Court held that pleading and proof of a breach of the bond was unnecessary or had not been properly done. In any event petitioner has known from the commencement of this litigation that respondent's theory of breach of the bond would be that set out by the District Court above, but it has never, and does not in its present brief, set out any argument or authority to show that such pleading or proof are insufficient to support a judgment against it.

As we pointed out in our introductory remarks in this brief, the reasons assigned by petitioner for granting this writ bear no relation whatsoever to the reasons which this Court has indicated in its Rules will incline it to review a case. All four of petitioner's reasons go back to its claim that it has been deprived of an opportunity to present defenses. We have hereinabove shown in detail that there is no merit in this claim, and it is sufficient at this time to point out that petitioner devoted the period from July, 1937, to December, 1939, to a vain effort in every available court in the State of Ohio to defend and defeat Harshman's liability to the Chambers Estate, and the period from December, 1939, to the present to what has been to date a vain effort in every available Federal court to defeat its own liability. On the face of such a record, we cannot understand how petitioner can now come into this Court and say in good conscience that this Court should review this case so that petitioner may be granted its day in court.

V. CONCLUSION

On behalf of respondent we respectfully submit that this Court should deny a writ of certiorari herein for the following reasons:

A. A majority of the questions which petitioner alleges to be presented are not in fact presented in this case, and on those questions which are presented petitioner has wholly failed to show error on the part of the lower Court.

B. The reasons assigned by the petitioner for the granting of this writ not only fail to bring the case within the pertinent rules of the Court, but are in fact without any legal merit or foundation of fact in the record.

C. The entire subject matter of this litigation is strictly local in nature for the last analysis it involves simply the question of how to determine the liability for maladministration by a fiduciary under the control of an Ohio probate court, and the question of how to enforce such liability against the surety on an official Ohio form of administrator's bond. The determination of these questions is governed entirely by pertinent provisions of the Ohio Probate Code and by pertinent decisions of Ohio courts; and the lower Courts in this action have correctly applied the pertinent Ohio statutes and decisions in arriving at the judgment which petitioner now seeks to have reviewed by this Court. The refusal of the Supreme Court of Ohio to review this case in the proceedings on exceptions would seem to be a very nearly conclusive reason why this Court should not review this case insofar as it presents the same questions presented to that Court.

Having carried this case through nearly six years of expensive and vexatious litigation in four state courts and two federal courts in a vain effort to defeat its promise to stand good for the defaults of its principal, it seems to us that

petitioner, in seeking a further review of these purely local matters by this Court, comes very close to abusing the right to seek such review.

Respectfully submitted,

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